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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-392.

RICHARD CRAMER and GWENDOLYN S. CRAMER,
Petitioners,

v.

DIRECTOR OF REVENUE,
(Formerly State Tax Commissioner)
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

BRIEF FOR RESPONDENT IN OPPOSITION.

At the specific request of the Court, by letter from the Clerk dated November 6, 1972, received November 15, 1972, Respondent files this Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of the State of Delaware.

JURISDICTION.

Jurisdiction of this Court has not been properly invoked under 28 U. S. C. § 1257(3). The jurisdictional defects of the Petition are discussed in the argument portion of this Brief.

QUESTIONS PRESENTED.

1. Is the Petition for a Writ of Certiorari fatally defective because it fails to comply with Rule 23(1)(f) of the Rules of this Court?

2. Does this Court have jurisdiction to review the judgment below when the single purported federal question drawn into issue here apparently was not properly presented to or decided by the highest state court?

3. Does this Court have jurisdiction to review the judgment when the single question drawn into issue by the Petition is not a substantial federal question?

STATUTORY PROVISIONS INVOLVED.

30 *Del. Code*, § 1118, as amended by 49 *Del. Laws*, ch. 104, § 7, effective January 1, 1953, states in pertinent part:

> "§ 1118. Deductions
>
> "In computing net income, the following deductions shall be allowed—
>
> • • •
>
> "(3) Taxes imposed upon and accrued or paid by the taxable, including Delaware liquor and gasoline taxes, within the income year, except Delaware income taxes assessed for local benefits of a kind tending to increase the value of property assessed, and Federal Income Taxes in excess of $300."

STATEMENT OF THE CASE.

The Respondent takes no issue with Petitioner's[1] representations as to residence and domicile in Pennsylvania, to his employment in Delaware and as to the existence during 1962 and 1963 of Petitioner Richard Cramer's physical infirmity. There is, however, nothing in the record of this case which supports Petitioner's assertions that it was *necessary* for him to work at home.

Further, the State Tax Board, reviewing the ruling of the Respondent, determined as a matter of fact that only some of Mr. Cramer's time spent in Pennsylvania reading and thinking about his job was so spent with the permission or under the direction of his Delaware employer (Petition, p. 15). Applying its rule formulated in *McClellan v. State Tax Commissioner,* Docket No. 277, June 18, 1965, 1 Del. Tax Cases ¶ 200-113, Exhibit A, pp. 11-16, *infra,* the State Tax Board held that only for so much of his time spent at home under the direction or with the permission of his Delaware employer could Richard Cramer be considered compensated by his employer. The other time spent at home was held to be voluntarily so spent and, insofar as the employer may have benefited, a voluntary contribution to the employer. And, insofar as Mr. Cramer worked at home with the permission or under the direction of his Delaware employer, the time he spent in excess of eight hours for each twenty-four-hour day also was held to be a voluntary contribution to the employer, since the employer required of its salaried employees only eight hours of labor per ordinary working day. For the same reason, the Board found that Mr.

1. Although both Mr. and Mrs. Cramer were parties to the proceedings below respecting their joint tax return, the relevant facts here concern only Richard Cramer, to whom the term "Petitioner" refers throughout the balance of this brief.

Cramer's time spent on weekends and holidays was not required and, hence, not compensated. Taking, then, only the amount of time during the ordinary number of hours required by the employer on the employer's regular working days, the Board apportioned Petitioner's income between the time spent by Mr. Cramer at the Delaware laboratories and offices of his employer and the time spent by him at home under the direction or with the permission of his employer.

It is not apparent that Petitioner has heretofore raised, far less pressed, any constitutional challenge to this method of apportionment, either at the State Tax Board or in his appeals to the Superior Court and Supreme Court of Delaware.

REASONS WHY THE WRIT SHOULD BE DENIED.

I. The Petition Is Fatally Defective for Its Failure to Show Prima Facie, as Required by Rule 23(1)(f), Whether or in What Manner the Federal Question Asserted Here Was Presented to or Decided by Any State Court Below.

Rule 23(1)(f) of the Rules of this Court requires that a petition for a writ of certiorari seeking review of a state court judgment, such as here, shall specify "the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised." Neither in the "Statement of the Case" nor elsewhere in the Petition is this information given.

Rule 23(1)(f) further requires that the Petition detail the method by which the federal question was raised in and the way in which it was passed upon by the state court. The Petition does not provide this Court with any information in either regard.

The only effort made by the Petitioner to comply with Rule 23(1)(f) is the bald assertion at p. 5 of the Petition that:

> "Constitutional questions pressed in this Petition have been consistently raised by Petitioners throughout the proceedings. See Appendix B, *infra* p. 16. Neither the tax board nor the appellate court of the State of Delaware treated the constitutional questions in their decisions."

An examination of Appendix B, p. 16 of the Petition reveals a discussion of a constitutional challenge *only* to 30 *Del. C.* § 1118(3) respecting a deduction for Federal in-

come taxes paid on the Delaware income tax return. *That* constitutional issue is not so much as mentioned, far less discussed, anywhere else in the Petition.

Nowhere in the Petition has Petitioner revealed whether or in what manner the alleged federal issue of allocation of income was presented to or decided by either the Superior Court of the State of Delaware, in and for New Castle County, or the Supreme Court of the State of Delaware. Since this Petition does not comply with Rule 23(1)(f) in any respect, sufficient reason exists to deny the Petition under Rule 23(4).

II. This Court Lacks Jurisdiction Under 28 U. S. C. §§ 1257(2), 1257(3) to Review the State Court Judgment Since the Federal Question Here Asserted Never Was Properly Drawn Into Question or Decided Below.

The Petitioner seeks review of a state court judgment for an asserted federal question, viz., the conformity of Delaware's method of apportioning for tax purposes Petitioner's income between Delaware and Pennsylvania with the requirements of Due Process, United States Constitution, Fourteenth Amendment. If this were a genuine federal question, which Respondent contends it is not, Petitioner must demonstrate that this Court has jurisdiction to consider it. This Court has repeatedly held that a question presented for review either must have been specifically decided by the courts below or must have been presented to those courts in such a manner that it was necessarily decided in the course of reaching their judgments. *Street v. New York*, 394 U. S. 576, 581-582 (1969); *Bailey v. Anderson*, 326 U. S. 203, 206 (1945); 28 *U. S. C.* §§ 1257(2), 1257(3). There is nothing in the Petition to indicate that *this* federal question, as opposed to a challenge to the deduction for federal income taxes, was ever presented as a

constitutional issue below such that the state courts could pass upon it. And when it is not apparent that the highest state court has passed upon a federal question, this Court will assume "that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. See, *e.g.*, Bailey v. Anderson, *supra;* Chicago I. & L. R. Co. v. McGuire, 196 U. S. 128, 131-133 (1905)." *Street v. New York, supra,* at 582.

In the absence of demonstrable jurisdiction to review the federal question asserted by this Petition, the Petition ought to be denied.

III. This Court Lacks Jurisdiction Under 28 U. S. C. §§ 1257(2), 1257(3) to Review the State Judgment Since the Validity of No State Statute Is Drawn Into Question Nor Is Any Title, Right, Privilege or Immunity Specially Set Up or Claimed Under the Constitution of the United States by This Peittion.

Petitioner has argued as the sole reason for granting the Writ that the Respondent has imposed a Delaware tax upon the income attributable to services performed outside of the taxing jurisdiction by a nonresident. If this representation of Respondent's taxing activity were true, a federal question might be at issue. But such activity simply has not taken place. It has been the policy of the Respondent to impose Delaware's income tax on income received by nonresidents from Delaware employers, apportioned between Delaware and the state of residence according to the degree in which the total employment activity took place in Delaware or elsewhere. The Respondent has ruled that an employee is paid by his employer for those activities undertaken by the employee under the direction or with the permission of the employer. See

McClellan v. State Tax Commissioner, No. 277, Exhibit A, *infra*. If an employee spends additional time or effort on his work, to the extent the employer is benefited, it is a voluntary contribution to the employer. Since this extra time or effort is not required by the employer as a condition for payment of salary, i.e., since the employee would receive his full salary whether or not he spends the additional time, it may not be considered in the allocation of a nonresident's income between Delaware and elsewhere. Just as *extra* time spent in his Delaware laboratory would not increase the allocation of a nonresident's income to Delaware, so *extra* time spent elsewhere would not decrease the allocation of nonresident income to Delaware. The Respondent has found that this employer ordinarily requires its salaried research employees to spend eight hours per day, excepting Saturdays, Sundays and holidays, at the employer's laboratories in Delaware. Petitioner has not contested this finding. Accordingly, Petitioner Richard Cramer's income is allocated to Delaware according to the percentage of total days worked in Delaware out of the total days worked under the direction or with the permission of the employer.

Petitioner, however, appears to contend that the requirements of his employer are irrelevant to the allocation of the income he receives, that *all* time spent, even on his own initiative at the place of his own choosing, ought, as a matter of Due Process, to be the basis of allocation. Such a contention does not raise a federal question. As this Court declared in *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444 (1941):

> "* * * A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given,

to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly civilized society."

The Petitioner is not self-employed. He works for, receives a salary from, is supervised by and spends much of his required working hours at a chemical company in Delaware. He can be said to be employed or to carry on his occupation only so far as he performs his work as directed or authorized by his employer in Delaware. Cf. *Shaffer v. Carter*, 252 U. S. 37, 52 (1920). To the extent that Petitioner's work is also his hobby, that is not a basis on which his salary is paid or on which his Delaware income tax ought to be levied.

CONCLUSION.

For the foregoing reasons and authorities, a Writ of Certiorari to review the judgment and opinion of the Supreme Court of the State of Delaware should be denied.

Respectfully submitted,

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EXHIBIT A.

STATE TAX BOARD
STATE OF DELAWARE

DOCKET No. 277.

WILLIAM R. AND MARY G. McCLENNAN,
Petitioners,

v.

STATE TAX COMMISSIONER
Respondent.

Opinion and Decision.

This is an appeal from an assessment by the State Tax Commissioner of a deficiency in Delaware personal income tax for the year 1961, heard upon Petition and Answer, Exhibits, Oral Arguments and Briefs.

Carl W. Mortenson, Esquire, of Wilmington, Delaware for Petitioner. Ruth M. Ferrell, Deputy Attorney General, for Respondent.

Leroy A. Brill, George L. Townsend, and W. Howard Workman, State Tax Board:

The Petitioner* is a resident of the State of Pennsylvania but is employed in Delaware as a research chemist by the Du Pont Company. The question in this case concerns the allocation of part of his earnings from his em-

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* Petitioners filed a joint return, but reference herein is to Dr. McClennan as Petitioner or taxpayer.

ployment to work performed outside the State of Delaware, and therefore tax exempt.

In computing his Delaware income tax for 1961, taxpayer excluded as non-taxable the portion of his salary attributable to 153½ days of services performed outside the State. Except for two or three days during which he traveled to Chicago in connection with his employment, the Commissioner disputes taxpayer's computations. Taxpayer claims, and has proven, that during the time he was in a hospital in Pennsylvania he performed some of his duties by having his sister, also employed at Du Pont, bring material to the hospital on which he would work. He worked a considerable number of hours during his stay in the hospital, which he translated into days of allocation as services performed outside of Delaware. The remaining days claimed consisted of time spent working at his home in Pennsylvania on weekends.

Basically, taxpayer's position is that under his contract of employment he is an "inventive" employee and any ideas that he develops in connection with his job belong to Du Pont, regardless of when and where conceived; and because his employment contract calls for his entire time to be spent in the employment of Du Pont, all hours he spent in mental or physical activity on his employment should be counted as days worked.

The Tax Commissioner does not contest the apportionment to days not employed in Delaware of the days covering the trip to Chicago, but claims that all of the rest of the time allocated by Petitioner to employment outside of Delaware consisted of hours of voluntary services; and that the only effect of his employment contract is that he is not free to disclose any ideas, patents or formulas of which he has knowledge or developed in connection with his employment, and that he is not to accept other employment during the term of his employment with Du Pont.

Under the provisions of Section 1101, of 30 Del. Code, a non-resident of Delaware is defined, and his income is taxable, as follows:

> "(7) every natural person who is a non-resident of the State of Delaware, if but only to the extent that such person received income during the taxable year as compensation for personal services rendered in the State of Delaware as an employee, in the conduct of the business of an employer, . . ."

Pursuant to this provision, the Commissioner promulgated a regulation in the form of instructions on the non-resident tax return which was in effect during the taxable year involved, and which was introduced in evidence. The formula thus applied for some years in Delaware treats as taxable only the portion of the income resulting from application to total salary of a fraction consisting of the total number of days of service rendered for the employer in Delaware divided by the total number of days of service for the employer everywhere. In computing the fraction to be applied, non-working days, such as holidays, are excluded. In explanation of the formula appearing in the instructions, the Commissioner there states (emphasis ours):

> "Contrary to existing law and regulations, numerous methods have been presented by taxpayers and counter-acting formulas introduced by staff personnel in striving to determine 'taxable income' of non-residents of Delaware who are *required to perform official services* outside of Delaware for their employers."

This statement reflects the administrative practice of attributing to exempt, out-state earnings only those serv-

ices required of an employee in connection with his job. We think the Commissioner's interpretation and the formula worked out by him, with the assistance of an opinion of the Office of the Attorney General dated May 9, 1956, is a reasonable and practical one. We find accordingly that only services required in his employment to be performed outside of Delaware may be excluded by a non-resident in computing the portion of his income which is not subject to tax by Delaware.

Commendable as it was for an executive employee such as the Petitioner to work on weekends, during vacations, and even while he was in the hospital, yet it was voluntary on his part and was done, of course, with the hope of advancement and additional remuneration by way of bonus or fringe benefits.

There is very little law on this particular point. However, it has been held that where the law is based on services rendered within the State, no deduction is allowed for earnings during vacation periods outside the taxing state. *Hughes v. Tax Commissioner,* Minn. Dist. Ct., 2nd Jud. Dist. (Dec. 1937). In *Hughes v. Spaeth,* 207 Minn. 577 (at 578), 292 N. W. 194, the taaxpayer attempted to deduct a proportion of his salary for a paid vacation taken outside of Minnesota. In denying this claim, the Court held that employment is unitary, and that "people are paid for working, not taking vacations." The Minnesota statute provided that "income of non-resident taxpayers from such sources (compensation for labor or personal services) shall be assigned to this State if, and to the extent that the labor or services are performed within it." Thus the Minnesota law was quite comparable to our statute.

Concerning taxpayer's argument that he was paid for his entire time, the employment contract contained the following provision:

"that the employee shall devote his entire time and his best efforts . . . during the period of his employment by the employer . . . to such duties as may be assigned to him, ..."

Taxpayer would have us construe his contract to require that his entire time, whether on or off the job, was at the disposal of his employer. However, it takes no citation of law to find that the reasonable interpretation of such clauses in employment contracts is merely that the employee's entire, regular working hours shall be at the disposal of the employer, and he shall not accept other employment during regular business hours.

Another point originally made by Petitioner but deferred or abandoned on brief, was that the Delaware law as applied to taxpayers in the position of the Petitioner is unconstitutional. While we have serious doubt as to whether the Tax Board may pass upon the constitutionality of a Delaware statute or its application, we note in passing that the Supreme Court of the United States has held that a State may impose non-discriminatory income taxes upon incomes accruing to non-residents from their occupations carried on within the State. See *Shaffer v. Carter*, 252 U. S. 37, 40 S. Ct. 221 (1919), followed in *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, 40 S. Ct. 228.

With respect to the trip to Chicago, it is clear that compensation for those days is excludible as for duty assigned outside of the State. A third day was used by Petitioner in travel, and although there is some indication in the evidence that this resulted from travel arrangements for his personal convenience, we find that he is entitled to exclude all three days for this trip.

Accordingly, we must find in favor of the Commissioner and against the Petitioner. The assessment is up-

held, except to the extent that it does not include an allocation of earnings for three working days for services performed outside Delaware.

TAX BOARD OF THE STATE OF DELAWARE

LEROY A. BRILL
Leroy A. Brill

GEORGE L. TOWNSEND
George L. Townsend

W. HOWARD WORKMAN
W. Howard Workman

Date of Decision: June 18, 1965